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SUBJECT: KENYA MAKES STEADY PROGRESS COMBATING COUNTERFEITING AND
ENFORCING IPR IN 2006

REFS: (A) STATE 0794 (B) NAIROBI 0583 (C) NAIROBI 0439

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11. Sensitive but Unclassified. Please protect accordingly.

Summary

12. (SBU) Although the Kenyan Minister of Trade himself admits that his country is the "dumping ground in East Africa for substandard goods" from China and India, Kenya in fact made steady progress in 2006 towards more effective enforcement of intellectual property rights. In November, the government established an enforcement division within the Kenya Copyright Board (KCB) in the Office of the Attorney General (AG). It has since made several high profile confiscations and begun developing working relationships with the American Chamber of Commerce of Kenya (ACCK), the Kenya Association of Manufacturers (KAM), and other business associations. The AG will likely table an Anti-Counterfeit Goods bill before Parliament this spring. Following a February 20, 2007 meeting with an executive from GlaxoSmithKline, Trade Minister Mukhisa Kituyi announced that the government would seek passage of an anti-counterfeit medicines bill this spring as well. End Summary.

Pressure Yields Some IPR Results

¶3. (SBU) In response to repeated complaints from the American Chamber of Commerce of Kenya (ACCK), the Kenya Association of Manufacturers (KAM), and other business associations that Kenya must do more to safeguard intellectual property rights, the Government of Kenya (GOK) established in November 2006 an IPR enforcement division, staffed by five prosecuting attorneys and two police investigators, within the Office of the Attorney General's Kenya Copyright Board (KCB). At the time, Minister of Trade and Industry Mukhisa Kituyi vowed that Kenya would no longer be the "dumping ground in East Africa for substandard goods," from China and India. He said Kenya would strengthen surveillance of its sea and land borders, prohibit Kenya from being used as a transit country for trafficked goods destined for other nations, and pursue agreements with its neighbors on joint customs operations. In keeping with these commitments, the Kenya Revenue Authority's (KRA) Deputy Commissioner in Charge of Policy and Legislation Creck Boyange announced on February 19, 2007 that Kenya had purchased four patrol boats from a Dutch firm to "facilitate customs anti-smuggling patrols in the Indian Ocean and Lake Victoria." In an attempt to stem the flow of pirated goods from their source to Kenya, the GOK signed an agreement with China last fall wherein Chinese officials promised to make a good faith effort to prevent the shipment of bogus products to Kenya.

¶4. (U) Minister Kituyi participated in a number of high profile confiscations and destructions of pirated goods, ranging from Bic pens, to cans of phony Kiwi shoe polish from China stamped "Made in Kenya," to illegal copies of Microsoft software. In February 2007 police officers attached to the KCB's Copyright Enforcement Division confiscated 40 personal computers from two Nairobi retail outlets

after discovering they were loaded with pirated Microsoft software. Kituyi was particularly incensed when KRA officials discovered that counterfeiters had forged the government's "Diamond Mark of Quality" in their attempt to smuggle the bogus Bic pens (ref D).

Pending IPR Legislation

¶5. (U) Assistant Trade Minister Abdirahman Hassan was among several senior Kenyan officials who attended an inaugural ACCK November 1-3, 2006 East Africa IPR Conference (ref E). Other government participants were from KRA, the KCB, the Bureau of Standards (KBS), and the Kenya Industrial Property Institute (KIPI). Attendees called upon Parliament to pass the GOK's proposed Anti-Counterfeit Goods bill. In her address before a January 26, 2007 International Customs Day audience, Commissioner of Customs Wambui Namu said the government would seek passage of the bill when Parliament reconvenes on March 20. KRA Commissioner General Michael Waweru added that Kenya would encourage its East African Community (EAC) partners to consider adopting a regional anti-counterfeit bill consistent with the East African Community Customs Management Act (ref B).

¶6. (SBU) The government also intends to seek passage of a bill prohibiting the sale of counterfeit medicines. Following a February 20 meeting with the GlaxoSmithKline President of Pharmaceutical Operations David Stout, Minister Kituyi said the GOK would press Parliament to adopt an anti-counterfeit drugs bill. Kituyi assured Stout that in the meantime the GOK would destroy all counterfeit products. According to Sylvance Anderson Sange, the KIPI Chief Trademark Examiner, Kenya will amend its industrial property rights laws to "domesticate WTO decisions on TRIPS." This, he explained, is in keeping with Kenya's efforts to ensure that its IPR laws conform to international statutes.

Motivations in Favor of IPR

¶7. (SBU) Aside from wanting to better adhere to its TRIPS obligations, Kenya has become more IPR-conscious for several reasons:

-- Local manufacturers and legitimate traders are clamoring that their businesses are being undermined by counterfeit goods.

-- Multinational corporations such as Sara Lee have threatened to vacate Kenya if the government does not combat pirating.

-- Kenyans were taken aback in 2006 when Japan patented the "Kiondo" brand of hand-woven baskets and handbags made by Kikuyu women of central Kenya and the Akamba women of eastern Kenya. Similarly Kenyans are astounded that a British company, "Kikoi Ltd.," has attempted since last August to patent the word "kikoi" as an exclusive UK trademark. In the Kenyan context, kikoi is a 100 percent East African hand-knitted cotton sarong. Kenyans now realize that they, too, can lose out if they do not legally claim and protect homegrown intellectual property.

-- Kenyan pastoralists have suffered large losses of livestock when using adulterated tick sprays that left their cattle vulnerable to pest-borne diseases.

-- Without their consent or payment of royalties, Kenyan musicians, writers, and artists have had their works copied. In August 2006, President Mwai Kibaki acknowledged that counterfeiting is denying Kenyan musicians, artists, recording companies, and publishers a return on their creations and investment. He called upon the police and the judiciary to collaborate in combating piracy. (Note: In Kenya, common counterfeit goods include substandard batteries, fake drugs, pirated music and films, illegal computer software, and textbooks. An estimated 80% of all popular trademarks have been counterfeited and 97% of all music cassettes sold in the local market is believed to be pirated. According to KRA, counterfeiting costs legitimate producers an estimated USD 430 million per annum in Kenya. The government suffers about USD 90 million in lost revenue annually. End Note.)

----- IPR Enforcement Agencies in Kenya -----

18. (U) The enforcement of intellectual property rights in Kenya has been a joint effort between rights holders and various government agencies. For example, the Anti-Counterfeit and Substandard Products Secretariat, a unit that was housed in the KRA, drew members from other government departments such as Weights and Measures, KBS, KIPi, KCB, and the Department of Trade in the Ministry of Trade and Industry. It also had members from the private sector, including KAM and the Music Society of Kenya (MSK). Formed to deal with various counterfeit and piracy matters, it successfully carried out raids on various premises, seized goods, and had the cases brought to court. However, its legality was challenged in court, leading to its disbandment in 2005 and the rebirth of an anti-counterfeit enforcement division within KRA.

19. (SBU) Partly as a result of Kenyan participation in USPTO GIPA training programs, the KCB is putting together a copyrights database and, in concert with the KRA, is designing an authentication device, which will be affixed to all audiovisual and software products approved by the board. This anti-piracy security device will be used to identify legitimate products. In other new developments, the government has begun de-linking the KCB from the Office of the Attorney General to give it the independence to ensure the effective administration and enforcement of copyright legislation in the country.

----- Anti-Counterfeit Bills Good of 2006 -----

10. (U) The Anti-Counterfeit Goods bill of 2006 aims to recreate (by statute) the Anti-Counterfeit and Substandard Products Secretariat. The new agency would be an independent corporate body

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consisting of representatives of both the private and public sectors. It would coordinate with national, regional, or international organizations involved in combating counterfeiting.

The proposed law provides for penalties that are pegged to the retail value of the legitimate goods. A first-time offender would be liable to a penalty three times the market value of the goods

and/or three years in prison. A repeat offender would be subject to a fine five times the value of the goods and/or five years in prison. The proposed act makes it an offence for one to obstruct an inspector in the course of his duties or to disclose information that is deemed to be a trade secret. This offence is punishable by a maximum fine of Ksh 2 million (about USD 28,600) and/or three years in prison.

¶11. (U) Passage of the Anti-Counterfeit Goods bill is a government priority. The AG has been quoted as saying "my office is committed to ensure that the Bill is published and debated in the National Assembly and enacted by parliament during the course of this year."

¶12. (SBU) Comment: As counterfeiting has become a larger issue in the economy, the GOK has responded well and come a long way in improving protection of IPR in Kenya. But much work still needs to be done. In an election year full of other distractions, the test will be whether the GOK can maintain the momentum established in 2006 by following through on the promises and commitments it has made.
End Comment.

Ranneberger